TESTIMONY OF
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ANACORTES, WASHINGTON

BEFORE THE
SUBCOMMITTEE ON OCEANS AND FISHERIES
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
UNITED STATES SENATE
WASHINGTON, D.C.

March 26, 1998

Thank you Madam Chairwoman and Members of the Committee. My name is Jeff Hendricks. I am General Manager of Alaska Ocean Seafood Limited Partnership (the Partnership) in Anacortes, Washington. I appreciate the opportunity to appear before the Committee on Commerce, Science, and Transportation and the Subcommittee on Oceans and Fisheries as you consider passage of the American Fisheries Act.

The Partnership, which is a citizen of the United States within the meaning of 46 U.S.C. § 12102(c), owns and operates the vessel ALASKA OCEAN;[1] the ALASKA OCEAN is one of the most modern surimi factory trawlers in the United States, and represents an investment in excess of $60 million. The ALASKA OCEAN operates in the Alaska groundfish industry for a target species of Alaska pollock.

I am principal captain of the ALASKA OCEAN. In addition, I manage and through my companies have an ownership interest in the F/V AURORA and the F/V AURIGA, which are stern trawlers that harvest pollock and other species for delivery to

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[1]A picture of the ALASKA OCEAN, together with a profile and a crew organizational chart, are attached to my testimony.

Alaska shoreside processors.

My current involvement in the North Pacific fisheries is the culmination of a long family history of such involvement. My grandfathers operated halibut schooners in the Gulf of Alaska and the Bering Sea. One of my sons captains the AURORA, and another is Chief Mate on the ALASKA OCEAN. I personally have participated in the crab and groundfish fisheries for almost 30 years. In the early 1980's, I owned and operated trawlers that delivered catch to foreign mother ship processors in joint venture operations. Later, we contributed to the full Americanization of the industry by constructing the AURORA and AURIGA for delivery of catch to U.S. shoreside processors, and introducing the ALASKA OCEAN with at-sea harvesting and processing capability.[2]

My partners and I committed to the ALASKA OCEAN project in 1987. At that time, there was a definite need for U.S. processing capability: *over 80% of Alaska pollock was processed by foreign at-sea processors.* We spent two years of negotiation and effort to develop a design and find a capable, cost-effective shipyard. Those efforts included solicitation of bids from 11 U.S. shipyards; only one responded with a complete bid proposal and that proposal was unacceptable. We were able to find an acceptable shipyard overseas, and after a year of extensive shipyard work to convert the vessel from an offshore supply vessel to a factory trawler, the ALASKA OCEAN was completed and

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[2]To understand the significance of this, it is necessary to understand the economies of the pollock fishery. Pollock is a high-volume, low-value fish. Its real (or added) value comes through its processing. At the time we introduced our three vessels, 80% of the pollock resource was being processed by foreign-owned mother ships, and it was the owners of those ships who gained the added value of the product. In the case of the ALASKA OCEAN, the added value of our catch now goes to us - a majority-American-owned company. In the case of the AURORA and AURIGA, the added value of their catch now goes to an Alaskan-based shoreside processor.

[3]Our conversion involved our taking over an ongoing conversion project. A company named Sunmar Alaska, Inc. had purchased the vessel STATE EXPRESS from the Maritime Administration and had a contract for conversion of the vessel to a factory trawler. The principals

entered the Bering Sea/Aleutian Islands pollock fishery in 1990.[3]

Given our long history in the fisheries, our contributions to the Americanization of those fisheries, our investment in time and money in bringing the ALASKA OCEAN into service, and our complete compliance with the requirements of the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987,[4] we were utterly astonished when we learned of S. 1221. Quite simply, S. 1221 would legislate us out of business.

Our specific concern rests with Section 201 of the bill. As we understand it, Section 201 imposes a penalty on vessels over a certain size that were rebuilt under Section 4 of the Anti-Reflagging Act mentioned above.[5] Section 4, which is commonly referred to as the Rebuilding Grandfather, permitted certain vessels to be rebuilt overseas without a loss of fisheries privileges. Qualification for the Rebuilding Grandfather required (1) a purchase contract coupled with intent to use the vessel in the fisheries; (2) a shipyard contract; and (3) redelivery and documentation, all by specified dates certain. The ALASKA OCEAN qualified for this Grandfather and was rebuilt and documented with a fishery endorsement under its authority. In particular, the Grandfather required a purchase contract before July 28, 1987. The purchase contract for our vessel was entered into on July 8, 1987. Both the purchase contract and a Coast Guard ruling dated July 17, 1987, reflect an intent to use the vessel in the fisheries. The Grandfather required a conversion contract before July 12, 1988. Our conversion contract was entered into on July 11, 1988. Finally, the Grandfather required completion of the conversion and

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of the Partnership purchased all of the stock of Sunmar Alaska and by operation of law acquired the vessel and Sunmar's rights under the contract. We completed the conversion; when the conversion was complete and the vessel had entered service in the fisheries, the vessel was transferred from Sunmar to the Partnership and was renamed ALASKA OCEAN.

[4]Pub. L. 100-239.

[5]*Id.* § 4; 46 U.S.C. § 12108 note.

redelivery before July 28, 1990. The conversion of the ALASKA OCEAN was completed and the vessel redelivered to us on June 19, 1990.

The Anti-Reflagging Act was signed into law in January 1988. Now, *over a decade later*, S. 1221 would change the rules contained in the Rebuilding Grandfather by adding a *new* requirement: that the rebuilt vessel have been under the same ownership and control during the entire period from execution of the purchase contract through completion of the conversion. If it was not, and now undergoes a change in ownership or control, it loses its fisheries privileges unless its owner can somehow effectuate the surrender of a fishery endorsement held by a vessel of equal or greater size. This is impossible for the ALASKA OCEAN because there are no fishing vessels of equal or greater size in the U.S. fleet.

The preamble to S. 1221 and other materials circulated in the press and elsewhere suggest that this provision was introduced for some of the following reasons:

♦ Pollock stocks are in decline, and are showing signs of over fishing.

> **Data recently published by the North Pacific Fishery Management Council certainly suggests the opposite. The stability of the eastern Bering Sea pollock stock is remarkable in light of trends in most Asian pollock stocks and North Atlantic gadoid stocks which have collapsed or undergone strong fluctuations in catches and abundance. It appears that eastern Bering Sea pollock catches in the range of recent years are sustainable, and within the productive capacity of the stock and stock fluctuations observed over the history of the fishery.[6] Further, [b]eyond 1998 the exploitable biomass and yields are expected to <u>increase</u> with the recruitment (as age 3-year olds) of above average**

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[6]Stock Assessment and Fishery Evaluation Report for the Groundfish Resources of the Bering Sea/Aleutian Islands Regions, *prepared by the Plan Team for the Groundfish Fisheries of the Bering Sea and the Aleutian Islands* (Nov. 1997) (introduction).

[7]*Id*. § 1.5.6 (emphasis added). While it is true that the biomass has shown some decrease

year-classes. [7]

♦ Factory trawlers have higher bycatch and discard rates than catcher vessels.

Our personal experience, as operators of both a factory trawler and catcher boats, is that there is no significant difference. In addition, the comparison of catcher boats, which tend to be smaller than factory trawlers, cannot be made; smaller vessels do not carry observers so that there is no objective measurement of their bycatch and discard rates.

In any event, it is generally recognized that the Alaska pollock fishery is one of the cleanest in the world. The bycatch and waste alluded to in the press and elsewhere do not occur in the Alaska pollock fishery nor or they the result of the fishing activities conducted by the vessels that are the targets of this bill. The bycatch and waste are attributable to the flatfish and cod trawl fisheries, which, incidentally, are conducted by *smaller* catcher vessels and *smaller* factory trawlers.

Factory trawlers have lower recovery rates than shoreside processors.

There is again no scientific basis for this comparison. The starting point for determining recovery ratios is the weight of the catch. The catch on factory trawlers is weighed when it is pulled from the water; the catch handled by shoreside processors is not weighed for some 36 to 48 hours after it is caught. Physiological changes to the fish during that time inevitably will result in a loss of weight, and hence the appearance of a higher recovery rate.

There is no incentive for a factory trawler to under-report its catch in an open-access fishery such as the Alaska pollock fishery. There is however, a strong incentive for shoreside and mother ship processors, who must purchase their catch from catcher vessels, to insure that the catch weights are not over-logged.

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since 1993, [a]n increase in abundance is expected in future years as apparently above average 1995 and 1996 year-classes recruit to the exploitable population. *Id.* § 1.5.3.

- Large vessels, such as factory trawlers, are a greater threat to the fishery resource than smaller vessels.

  There really is no empirical evidence for this. As noted above, the Alaska pollock stock, which is harvested by some of the largest vessels in the American fleet, is healthy. The New England fisheries, on the other hand, which are harvested primarily by smaller vessels, are seriously depleted. And it should not be overlooked that larger vessels generally bring other advantages to the fisheries, such as safer construction; better crew accommodations; economies of scale; and far greater regulatory scrutiny from myriad agencies including the Coast Guard, OSHA, the State of Alaska, and the North Pacific Fishery Management Council.

- The factory trawlers supplanted vessels that were delivering to shoreside processors, thus causing economic harm to the communities where the processors are based and causing losses of American jobs.

  That certainly is not true in our case. Our vessels replaced vessels that were engaged in joint venture fisheries in which we delivered our catch to foreign mother ships. In the case of the ALASKA OCEAN, we now process our own catch, and our other vessels now deliver to a shoreside processor. Thus, with respect to our own operations, we actually *increased* the amount of fish going to shoreside processors.

We have also been told that this provision has been introduced because the Coast Guard misinterpreted the Rebuilding Grandfather and should not have issued fishery endorsements in cases where changes of ownership or control had occurred during the Grandfather qualifying period. It is very difficult for us to understand how the Coast Guard's interpretation can be wrong, when it comports with the plain language of the statute itself. The Rebuilding Grandfather, on its face, applies to vessels, not to owners or to controlling parties of owners. Neither the words nor even the concepts of ownership or control appear anywhere in the language. Moreover, the Coast Guard's interpretation is nothing new. Shortly after the Anti-Reflagging Act's enactment, the Coast Guard began issuing written, publicly available rulings in which it articulated its view that the

Rebuilding Grandfather runs with the vessel, [8] and it promulgated regulations to that effect.[9] Surely, if Congress felt that the Coast Guard was misinterpreting the Rebuilding Grandfather, it could have acted at that point to correct the problem.

Instead, Congress has waited over ten years to address this issue and is now considering a provision which would have horrendous effects on the Partnership, rendering it the owner of nothing more than a frozen asset. First, the Partnership could never sell the ALASKA OCEAN because the sale would trigger a loss of fisheries privileges. Thus the Partnership could never recoup its $60 million+ investment; the ability to sell and recoup is the fundamental expectation of any investor. Furthermore, if the Partnership keeps the vessel, its only alternative, it would then have to comply with Section 102 (b) of the bill. That Section would require that entities owning fishing industry vessels be 75%-owned by U.S. citizens. As noted above, the Partnership complies with the citizenship requirements of existing law; it is 51%-owned by U.S. citizens. If the Partnership complies with Section 102 by increasing its American ownership to 75%, it will arguably have undergone a change of control under Section 201, and once again, the ALASKA OCEAN will lose its fisheries privileges and, for all intents and purposes, its entire value. Thus the American Fisheries Act would have the

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[8] *See, e.g.* Letter from U.S. Coast Guard to Michael D. Walker dated March 16, 1988. The Partnership itself received several such rulings.

[9] *See* 46 C.F.R. § 67.45 (b). Furthermore, the Coast Guard also issued regulations implementing another grandfather clause in the Anti-Reflagging Act which actually dealt with vessel ownership. *See id*. § 67.45 (a). The Coast Guard found that this grandfather attached to the vessel as well, a finding that was explicitly and unanimously affirmed by the United States Court of Appeals, which stated: Vessels, not owners, are either eligible or ineligible for documentation under federal maritime law. Endorsements are issued to vessels. . . . If a fishing vessel were to be exempted from [a requirement], one would expect the exemption also to be framed in terms of the vessel. *Southeast Shipyard Ass'n v. U.S.,* 979 F.2d 2541 (D.C. Cir. 1992)

anomalous effect of legislating out of the fishing industry some of the very people who have contributed to the Americanization of the fisheries.

Such a result is blatantly unfair. The bill would penalize the Partnership for not complying with provisions of law *that did not even exist during the only period of time during which the Partnership could have complied*.

In addition, our lawyers have advised us that such a result may have fiscal consequences to the Government as well. As we understand it, the result would be treated as a Section 1231 casualty loss for tax purposes, allowing us a 35% deduction which can be carried both forward and back. They have also told us that, absent just compensation, such a result may well be an impermissible taking under the Fifth Amendment of the Constitution. They have told us that, while the Government can regulate property to a certain extent, if regulation goes too far it will be recognized as a taking. [10] For example, in the case of *Lucas v. South Carolina Coastal Council*,[11] the Supreme Court stated: when the owner of . . . property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking. [12] This is precisely the result that the Partnership would suffer under the bill. Further, the federal courts have recognized that the Government is restricted in its ability to interfere with investment-backed expectations.[13] Of particular interest in this regard is a case now being considered by the

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[10]260 U.S. 393, 416 (1922).

[11]505 U.S. 1003 (1992).

[12]*Id*. at 1019. In any event, we do not see that any common good will be achieved here. Removing the ALASKA OCEAN from the fishery will not mean that less fish are harvested; it will simply mean that more fish are harvested by our competitors.

[13]*See*, e.g., *Ruckleshaus v. Monsanto*, 467 U.S. 986 (1984).

courts, *Maritrans v. U.S.*[14] In that case, Maritrans is seeking compensation from the Government because a 1990 law requires Maritrans either to equip its vessels with double hulls by a certain date, or remove them from service. Maritrans argues that the statute interfered with its reasonable, investment-backed expectations. On October 29, 1997, the court agreed, finding that Maritrans could not reasonably have foreseen the new requirement. There can be no question that the Partnership could not possibly have foreseen that, long after it placed the ALASKA OCEAN in service, it would be faced with a requirement that *it cannot possibly meet*. This is a clear - and totally unwarranted - interference with the Partnership's investment-backed expectations.

For these reasons, Alaska Ocean Seafood Limited Partnership urges that S. 1221 be defeated.

[14]Docket No. 96-483-C, Court of Federal Claims (filed Aug. 7, 1996).